Supreme Court, U.S.
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No. 90-1573

In The
Supreme Court Of The United States
October Term, 1990

VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor,

Petitioners,

v.

JOHN DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JOHN DOE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1573

VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor,

Petitioners,

v.

JOHN DOE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

**BRIEF IN OPPOSITION
OF RESPONDENT JOHN DOE**

Respondent John Doe submits this brief in opposition to the petition for a writ of certiorari in this case.1/

STATEMENT

Petitioners ask this Court to review the court of appeals' decision refusing to stay a temporary restraining order that enjoined petitioners from sponsoring a Roman Catholic mass as part of a festival in the Village park. The action has already been dismissed as moot at petitioners' behest. Moreover, one of the questions petitioners ask this Court to consider was neither presented to nor decided by the courts below. Under the

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1/ Respondent has used the fictitious name "John Doe" throughout this litigation. Pet. App. A-2.

circumstances, the petition for a writ of certiorari should be denied.2/

In 1989 and 1990, the Village of Crestwood, a suburban community southwest of Chicago, held Italian festivals in the Village park. As part of the 1989 festival, the Village sponsored a Roman Catholic mass, conducted by a priest in the park. It planned to sponsor such a mass again as part of its "Touch of Italy" festival on August 11, 1990. Pet. App. A-2 - A-5.

Respondent John Doe, a resident of Crestwood, filed suit on August 10, 1990, seeking both a temporary restraining order against the mass planned for the next evening and a permanent injunction

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2/ For reasons we discuss below, this is not a case in which it would be appropriate for the Court to issue an order vacating the court of appeals' opinion pursuant to United States v. Munsingwear, Inc., 340 U.S. 36 (1950). See infra, 13-15.

prohibiting petitioners from sponsoring masses in the future. The district court held a hearing that afternoon and issued a temporary restraining order. Pet. App. A-40 - A-48. The court found that the "Village's explicit and unambiguous sponsorship of a sectarian religious service as part of a Village-sponsored festival has an impermissible religious effect." Pet. App. A-45.

The Village then sought an emergency stay in the court of appeals. On August 11, 1990 the court denied the motion and stated that "[a]n explanation will follow in due course." Pet. App. A-1. But on September 19, 1990 -- well before the court of appeals' explanation arrived -- petitioners filed a motion in the district court to dismiss the complaint because the case had become moot. App., infra, 1a-4a. Petitioners pointed out that the mass had already

been conducted on private property and that "[t]he remaining activities of the Touch of Italy festival were not affected." Id. 2a. Respondent had also sought a permanent injunction against future masses; petitioners asserted that "[t]here is no new mass scheduled" and that "there is no plan to conduct the activity sought to be enjoined" in the future. Id. 3a. Accordingly, they argued, "[t]here is no longer any case or controversy for this Court to resolve." Ibid. Defendants also asserted that "[t]his case does not involve facts that are capable of repetition yet evading review." Ibid.

On October 15, 1990, at the request of the district court, petitioners filed a statement in support of their motion to dismiss signed by the Village Mayor, petitioner Chester Stranczek. App., infra, 17a-18a. The Mayor indicated that

"[t]he Village does not now contemplate that it will sponsor an Italian cultural festival in 1991" and that it "will not serve as the sponsor for a Catholic mass during the course of any Village-sponsored event occurring on public property." Id. 18a.

On October 26, 1990, while the motion to dismiss was pending in the district court, the court of appeals issued an opinion confirming its earlier action and affirming the district court's injunction. The majority of the panel, in an opinion by Judge Easterbrook, found that "the district court judge's conclusions cannot be found to be clearly erroneous." Pet. App. A-7.3/ The critical issue was whether the Village was sponsoring the mass; on the "slim

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3/ Judge Coffey dissented. Pet. App. A-7 - A-36.

record" available at the time, the district judge was entitled to conclude that it was. Ibid. The court of appeals noted that further proceedings were anticipated. "Doe wants an injunction against religious services at future festivals in Crestwood. We assume that the district judge will take evidence and make more detailed findings concerning the sponsorship of the mass and what, if anything, the Village has done (or could do) to demonstrate that it is providing a public forum but not endorsement." Ibid.

The further proceedings the court of appeals anticipated never took place, however, because petitioners persisted in their motion to have the district court dismiss the complaint as moot. The district court held a hearing on the motion on November 21, 1990. App., infra, 19a-32a. Respondent argued that the case was not moot because he was

seeking a permanent injunction against future masses. Id. 28a. But counsel for petitioners repeatedly assured the court that the Village had no plans to sponsor masses in the future:

> THE COURT: * * * My question, I guess, remains the same. That is, if there is an unequivocal statement by the Village that the mass in the form that was proposed at the time that the case came before me is not going to be repeated -- and at least that's what I understand your message to be, is it not?
>
> MR. McQUEEN [counsel for petitioners]: It is, Judge.
>
> * * *
>
> THE COURT: * * * [A]s I understand it, [the Village has made] an affirmative and firm undertaking that the factual setting that was before this Court in August when the case came up is not one that is going to be repeated.
>
> MR. McQUEEN: I think that is exactly, your Honor, what we presented in writing under the signature of one of the [petitioners], the Mayor, on behalf of the Village in the document we filed a month ago.

Id. 22a, 30a. In light of petitioners' assurances not only that they had complied with the court's temporary restraining order as to the mass scheduled for August 11th, but that they also had no intention of sponsoring masses in the future, the district court dismissed the complaint. App. infra, 31a.4/

REASONS FOR DENYING THE PETITION

The decision of the court of appeals, based on a scanty and undeveloped record, hinged on the factual determination that petitioners were about to sponsor a Roman Catholic mass as part of a municipal festival. Even if this

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4/ Respondent, who had opposed petitioners' motion to dismiss, initially filed a notice of appeal from the district court's mootness decision, but later voluntarily dismissed the appeal.

case had not already been dismissed as moot at petitioners' request and was based on a more substantial record, and even if both of the questions petitioners purport to present were raised and considered below, review of the court of appeals' fact-bound decision would be unwarranted. But in light of the fact that one of the questions presented -- the one that is also before this Court in Lee v. Weisman, No. 90-1014 -- was not presented to or decided by the courts below, and also in light of the fact that petitioners have already secured the dismissal of this action as moot, there can be no doubt that the petition should be denied.

I. There Is No Live Case Or Controversy Warranting Supreme Court Review

It hardly bears repeating that an actual, live controversy must exist at all stages of review and that this Court

cannot consider legal issues that are framed within moot cases. Lewis v. Continental Bank Corp., 110 S. Ct. 1249, 1253 (1990); Deakins v. Monaghan, 484 U.S. 193, 199 (1988); Preiser v. Newkirk, 422 U.S. 395, 401 (1975). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them' and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Lewis v. Continental Bank Corp., 110 S. Ct. at 1253 (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). As this Court explained in Lewis, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial

and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when the suit was filed, or when review was obtained in the Court of Appeals." Ibid.

In this case, the complaint has already been dismissed as moot by the district court on petitioners' own motion. Having succeeded in their effort to have the case dismissed, petitioners cannot now argue that there is a live case or controversy.

The district court accepted petitioners' assurances and dismissed the complaint as moot. That decision was not appealed and now stands as the law of the case. Under the circumstances -- and with the complaint already dismissed -- there is nothing more that this Court can do but to deny the petition.

II. The Court Should Not Issue A Munsingwear Order

This is not a case in which it would be appropriate to follow the procedure set out in United States v. Munsingwear, Inc., 340 U.S. 36 (1950), of vacating the court of appeals' judgment and instructing the district court to dismiss the complaint. First of all, the complaint has already been dismissed. Moreover, entry of a Munsingwear order is appropriate when "review * * * was prevented through happenstance." 340 U.S. at 40. When "review was prevented, not by 'happenstance,' but by the deliberate actions of the losing party before the district court," it is not appropriate to vacate the lower court opinions. Center for Science in the Public Interest v. Regan, 727 F.2d 1161, 1165 (D.C. Cir. 1984) ("CPSI").

It is one thing to vacate lower court decisions when the possibility of appellate review has been foreclosed by circumstances beyond the appealing party's control. But, as several courts of appeals have pointed out, it is quite another thing -- and an invitation to mischief -- to allow a losing party to avoid any future effect or precedential value an adverse decision may have by deciding to moot the action while an appeal or a petition for certiorari is pending. See, e.g., Riverhead Savings Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990); Blackwelder v. Safnauer, 866 F.2d 548, 551 (2d Cir. 1989); United States v. Garde, 848 F.2d 1307, 1311 (D.C. Cir. 1988); Northshore Development, Inc. v. Lee, 835 F.2d 580, 583 (5th Cir. 1988); CPSI, 727 F.2d at 1165-1166. Cf. Karcher v. May, 484 U.S. 72, 83 (1987) (this

Court will not vacate a lower court decision when the "controversy did not become moot due to circumstances unattributable to any of the parties").

In this case, petitioners decided that they would not continue their past practice of sponsoring masses in the Village park and thus mooted the complaint, particularly insofar as it sought a permanent injunction against future masses. In that circumstance, the parties should be left in the same position as if no appeal or petition had been filed, and the lower court decisions should be allowed to stand.

III. Review Of The Court Of Appeals' Decision Would Not Be Warranted Even If The Case Had Not Been Dismissed As Moot

Even if this case had not already been dismissed as moot, review by this Court would not be warranted. Try as they might, petitioners have failed to

cite a single case in which this Court or a court of appeals upheld municipal sponsorship of a full-blown religious service. There is no conflict among the circuits on this issue. In any event, this would not be an appropriate case for deciding that far-reaching Establishment Clause issue. As the court of appeals noted (Pet. App. A-7), its decision was based on a "slim record" as to the sponsorship and the precise nature of the planned religious observance. In fact, all that is formally in the record are the facts alleged in the verified complaint. Clearly any examination of such an important First Amendment issue would require a much better-developed record.

There is also no need to hold the petition in this case pending this Court's disposition of Lee v. Weisman, No. 90-1014 (cert. granted March 18,

1991). First of all, because this case has already been dismissed as moot, the outcome of Lee could not possibly affect the parties to this action. Even if the Court were to announce a new Establishment Clause test in Lee, there is no longer any case or controversy involving petitioners and respondent to which that test could possibly be applied.

Moreover, this case does not present the question at issue in Lee: whether direct or indirect government coercion is a necessary element of an Establishment Clause violation. Although petitioners include that issue as their second question presented, they did not make the coercion argument to either the district court or the court of appeals and neither of those courts considered or decided that issue. This Court does not ordinarily consider arguments not raised

or decided in the lower courts. Davis v. United States, 110 S. Ct. 2014, 2024 (1990); Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981). This moot case certainly does not warrant an exception to that rule.

Finally, although respondent believes that the First Circuit correctly decided Lee v. Weisman, even if this Court were to disagree and to hold that the benediction delivered at the public school graduation in that case does not violate the Establishment Clause, that would hardly mean that a municipality would be free to sponsor an entire religious service. If this Court were interested in deciding that much broader issue -- which would go to the heart of the Establishment Clause -- it should wait for a live controversy and a fully-developed record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 1991

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 4655
v.	)	
	)	Judge
	)	Milton I. Shadur
VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants, Village of Crestwood, Illinois ("the Village") and Chester Stranczek, by their attorneys Jenner & Block and pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby moves this Court to dismiss the plaintiff's complaint seeking injunctive and declaratory relief on the ground that plaintiff fails to state a claim for

which relief can be granted, because there is no case or controversy and because this case is now moot. In support of this motion, defendants state that:

1. Plaintiff filed this complaint on Friday, August 10, 1990, seeking to prevent a Roman Catholic mass from being conducted on Village property on Saturday, August 11, 1990, in conjunction with a Village-sponsored "Touch of Italy" festival. Late Friday afternoon, August 10, 1990, this Court issued a temporary restraining order forbidding the mass to go forward on Village property. An appeal was filed, but the Seventh Circuit refused to stay this Court's order. The Village abided by this order, and the mass proceeded on privately owned property. The remaining activities of the Touch of Italy festival were not affected.

2. There is no longer any case or controversy for this Court to resolve. The complained-of activity has already been enjoined; the mass was held on private property weeks ago. There is no new mass scheduled.

3. This case does not involve facts that are capable of repetition yet evading review. Plaintiff's success in obtaining a temporary restraining order enjoining the mass on public property demonstrates that fact. Consequently, this case is now completely moot.

4. A permanent injunction is an extraordinary remedy and should not be granted where, as here, there is no plan to conduct the activity sought to be enjoined.

5. In further support of this motion, defendants submit the accompanying memorandum of law.

WHEREFORE, defendants Village of Crestwood, Illinois and Chester Stranczek respectfully request this Court to dismiss this action.

Respectfully submitted,

VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK

By: _____
One Of Their Attorneys

Thomas K. McQueen
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE, Plaintiff,	)	
v.	)	No. 90 C 4655
VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity, Defendants.	)	Judge Milton I. Shadur

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendants Village of Crestwood, Illinois ("the Village") and Chester Stranczek, by their attorneys Jenner & Block, submit this memorandum of law in support of their motion to dismiss this action for failure to state a claim upon which relief can be granted. Because plaintiff has already successfully prevented the single act he sought to

enjoin and has not alleged that it will occur again, there is no case or controversy for this Court to resolve. Accordingly, this case must be dismissed.

INTRODUCTION

On August 10, 11, and 12, 1990, the Village hosted a three day "Touch of Italy" festival, which featured Italian food, drink, music, and entertainment. The festival also included a traditional Roman Catholic mass conducted in Italian, which took place on Saturday, August 11, 1990. As originally planned and advertised, the mass was to take place, with the other festival activities, in Caesar Park which is owned and operated by the Village. After seeing advertisements for the festival, including the mass, plaintiff filed this complaint on Friday, August 10, 1990, alleging that the celebration of the mass

on Village property would be unconstitutional. Plaintiff sought a temporary restraining order enjoining the mass, scheduled for the next day, from proceeding on public property. This Court issued the requested temporary restraining order. After unsuccessfully seeking stays of this order before this Court and the Seventh Circuit, the Village abided by this order, and the mass was conducted on private property on Saturday afternoon, August 11, 1990.

Plaintiff's complaint challenging the August 11 mass and seeking permanent injunctive and declaratory relief is still pending. This complaint, however, sets forth no claim upon which relief can now be granted, because the mass on Village property was blocked. Plaintiff does not allege any impending threat that defendants will attempt to celebrate a mass on public property. Thus, the

complaint presents no case or controversy for this Court to adjudicate, and the matter is now moot. Therefore, this case must be dismissed.

I. THIS ACTION PRESENTS NO CASE OR CONTROVERSY

To invoke the jurisdiction of a federal court, the plaintiff must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. Flast v. Cohen, 392 U.S. 83 (1968). It is well settled law that in requesting prospective relief a plaintiff must demonstrate that "he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury must be both real and immediate, not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). Past violations do not,

in themselves, present real and immediate threat of injury necessary to make out a "case or controversy." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

When, as here, the sole act sought to be enjoined has been enjoined, there is no immediate and real danger of sustaining a direct injury and thus no case or controversy to resolve. This principle is illustrated by Committee for a Sane Nuclear Policy v. Indianapolis, 668 F. Supp. 1211 (S.D. Ind. 1987). The plaintiffs obtained an injunction prohibiting the City of Indianapolis from interfering with the "Shadow Project," a demonstration that involved painting human silhouettes on city sidewalks to commemorate the victims of the Hiroshima bombing on the anniversary of the incident. After the Shadow Project was carried out, the plaintiffs sought to enjoin the city from arresting them or

harassing them in preparing for or conducting the next year's Shadow Project. The court held that the plaintiffs' perceived threat of arrest and civil liability was too uncertain and speculative to create a justiciable case or controversy. Rather, the court held, given the posture of the action, any opinion rendered would be advisory. 668 F. Supp. at 1216.

This case is no different. Plaintiff's fears that the Village next year will attempt to hold a mass on public property are simply too uncertain and speculative to create a justiciable case or controversy. Indeed, the complaint plaintiff has lodged with this Court does not even allege that a mass is scheduled for next year -- his challenge is directed solely at the August 11, 1990 mass. Give that the act that he challenges has already occurred, free of

the supposed constitutional defect of which he complained, plaintiff cannot show that he is in danger of sustaining a "real and immediate" injury. Lyons, 461 U.S. at 102. Accordingly, plaintiff's complaint presents no live case or controversy.

II. THE COMPLETION OF THE MASS RENDERS THIS CASE MOOT

The doctrine of mootness seeks to preserve the historic conception of the federal courts as agencies for the resolution of disputes on which something tangible turns, as opposed to merely providing authoritative legal advice. Moore v. Thieret, 862 F.2d 148, 150 (7th Cir. 1988). Thus, when the likelihood of the challenged activity recurring is slight, the case is moot. Id. In United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569 (7th Cir. 1987), the Court applied this principle

where the government sought to appeal an order allowing a drug company to re-export certain animal drugs that it had imported in alleged violation of the FDA Act. The order had not been stayed, and the company went ahead and re-exported the drugs before the appeal could be heard. The Court refused to examine the merits of the case because there was no evidence, and very little probability, that the company planned to import any more drugs into the United States. Thus, the Court held, the case had become moot.

This case is likewise moot. While the Village has promoted Italian festivals, mass included, in 1989 and 1990, there is no current plan for another festival, much less one including a mass on public property.

Moreover, this is not a case where mootness is avoided because the conduct is capable of repetition yet evading

review. Before a court will find that a claim is not moot on the ground that it is capable of repetition yet evading review, two conditions must be met: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) and there is a reasonable expectation that the same complaining party will be subjected to the same action again. James Luterbach Construction Co. v. Adamkus, 781 F.2d 599, 602 (7th Cir. 1986) (plaintiff's challenge to the denial of a construction contract award where facility was already constructed was moot and not capable of repetition yet evading review).

Here, the plaintiff became aware of the mass in advance because of the advertisements. It is inconceivable that the Village would hold another public festival without advertising to inform

the public. But its very nature, then, if this situation ever were to recur, plaintiff would have plenty of advance notice. Thus, plaintiff's success in enjoining the mass this year shows that it was, and would be (if ever necessary), able to obtain review. Therefore, this case is now moot.

III. PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

Permanent injunctive relief is an extraordinary remedy which should be granted sparingly and only for compelling reasons. Newhouse v. Probert, 608 F. Supp. 978, 984 (W.D. Mich. 1985). See Pfeifer v. Valukas, 117 F.R.D. 420, 424 (N.D. Ill. 1987) (permanent injunction is a drastic remedy). Such relief is not available to prevent hypothetical injuries feared as liable to occur at some indefinite time in the future, rather, the injury complained of must be

of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm. Newhouse, 608 F. Supp. at 978. Injunctive relief is not appropriate to prevent the possible occurrence of an event at some indefinite future time. Janowski v. International Brotherhood at Teamsters Local No. 710 Pension Fund, 673 F.2d 931, 941 (7th Cir. 1982), vacated on other grounds, 463 U.S. 1222 (1983).

Plaintiff has alleged no compelling reason for the extraordinary remedy of permanent injunctive relief. There is no imminent act to enjoin, and no clear and present need for equitable relief to prevent irreparable harm where no harm is alleged. This case does not even present a possible occurrence of an event at some indefinite future time, because plaintiff has not alleged that a mass may be scheduled on Village property in the

future. This Court should not issue an injunction in the absence of anything to enjoin.

CONCLUSION

Plaintiff alleges no claim upon which relief can be granted. Plaintiff's complaint challenges an action that was blocked several weeks ago; he does not allege that it will occur again. Thus, this action presents no case or controversy for this Court to adjudicate; the matter is moot, and injunctive relief is not available. Accordingly, this Court should dismiss this case.

Respectfully submitted,

VILLAGE OF CRESTWOOD, ILLINOIS
and CHESTER STRANCZEK

By: _____
One Of Their Attorneys

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 4655
v.	)	
	)	Judge
	)	Milton I. Shadur
	)	
VILLAGE OF CRESTWOOD, ILLINOIS and CHESTER STRANCZEK, Mayor of the Village of Crestwood, in his official capacity,	)	
	)	
Defendants.	)	

DEFENDANTS' STATEMENT IN SUPPORT OF THEIR MOTION TO DISMISS

NOW COME the VILLAGE OF CRESTWOOD by and through its Mayor CHESTER STRANCZEK, defendants herein, and in support of their motion to dismiss these proceedings, present the Court with the following statements:

1. The Village of Crestwood has promoted and sponsored two Italian

cultural festivals on Village property, one in 1989 and one in 1990. The Village does not now contemplate that it will sponsor an Italian cultural festival in 1991.

2. The Village will not serve as the sponsor for a Catholic mass during the course of any Village-sponsored event occurring on public property.

3. The Village has not previously sponsored and does not contemplate sponsoring the annual Polish cultural festival held in the Village of Crestwood on Village property.

Respectfully submitted,

THE VILLAGE OF CRESTWOOD

By: _____
Chester Stranczek
Its Mayor

Thomas K. McQueen
Barry Levenstam
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

October 15, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 4655
v.	)	
	)	Chicago, Illinois
	)	November 21, 1990
VILLAGE OF CRESTWOOD,	)	9:15 o'clock a.m.
ILLINOIS, et al.	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff: MS. JANE WHICHER

For the Defendants: MR. THOMAS McQUEEN &
MR. BARRY LEVENSTAM

JESSE ANDREWS
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U. S. District Court
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* * * * * *

THE CLERK: Case No. 90 C 4655, John Doe vs. Village of Crestwood, status.

MS. WHICHER: Good morning, your Honor. Jane Whicher for the plaintiff John Doe.

MR. McQUEEN: Good morning, your Honor. Thomas McQueen and Barry Levenstam on behalf of the defendants.

MS. WHICHER: Your Honor, I discovered last night that the copy of our responsive brief which was filed in your chambers was missing an exhibit which is referred to in footnote 3 on page 5, and I brought some copies of that exhibit with me this morning. I've already provided a copy to Mr. McQueen. And if I could have leave to submit those to your clerk?

THE COURT: Sure.

MS. WHICHER: Thank you.

THE COURT: George, do you want to hand that to me? (Document tendered.)

MS. WHICHER: Your Honor, that's the newspaper article that's referred to concerning a referendum on the Village ballot that refers to a 1991 Italian Festival.

THE COURT: Yes. Counsel, anything?

MR. McQUEEN: There was a referendum, your Honor, put I believe the week after your Honor entered the order in this case. The Village filed with the Clerk of the Court appropriate documentation for a referendum. There was a referendum on the ballot in November, and the voters spoke on the issue.

This article is from the middle of August -- well, later August -- August 25th -- according to the typewritten part there. But the Village has presented to your Honor its position with respect to the issue sometime

substantially subsequent to the time that this --

THE COURT: Yes. You've both gotten my letter, I trust?

MR. McQUEEN: Yes, Judge.

MS. WHICHER: Yes, your Honor.

THE COURT: And I saw what was covered in the memorandum from plaintiff's counsel. My question, I guess, remains the same. That is, if there is an unequivocal statement by the Village that the mass in the form that was proposed at the time that the case came before me is not going to be repeated -- and at least that's what I understand your message to be, is it not?

MR. McQUEEN: It is, Judge.

THE COURT: All right.

If that's true, then, although I understand the point that is made on behalf of the plaintiff, it seems to me that anything that is asked in terms of

permanent injunctive relief by definition has to deal with one of two alternatives. One is that the Court would be enjoining something that is not contemplated to be done, which I think is inappropriate for a District Court to do when dealing with public officials. And the other is that the Court is being asked either to render an advisory opinion -- that is, to deal with facts not before it in terms of how things would or would not be impacted by First Amendment considerations -- or is being asked to somehow act in a standby capacity because of other concerns that are voiced by the plaintiff in the memorandum.

Now the sort of astonishing characterization in the dissenting opinion about "valet service," which was I thought extraordinarily offensive, misses the fact that this Court, like

every court in this building -- that is, every court below the 26th floor -- stands ready on an emergency basis to deal with TRO's and preliminary injunctions of all kinds always. Nothing to do with whether they are First Amendment considerations or any other. When facts are presented to the court, which are fresh facts, the court looks at them, deals with them and rules on concrete controversies, not on hypothetical ones.

And what I find troublesome in the suggestion that the Court ought to somehow retain jurisdiction, given the nature of the representations that I have now had reinforced by the Village, is that I am asked by the plaintiff to indulge something other than Article III jurisprudence.

Having said that, I will say (as my letter indicated) that in a very

important sense it frankly strikes me, given what I have heard in the way of representation, that the defendant is doing exactly the same thing upstairs in the Court of Appeals -- that is, by what is being asked for. Now that's of course for them to decide. But it strikes me that where the conduct that was the subject of the injunction is gone -- it went without having been carried out -- that at this point what's being sought by the defendants is also an advisory opinion.

But that's their business, you know. Mine is mine. And I don't see anything, Ms. Whicher, in what's being presented that supports the notion that this Court has before it a live issue in permanent injunctive terms.

MS. WHICHER: Your Honor, if I might make two brief points in response. First of all, with regard to your Honor's

comment and Mr. McQueen's representation that the situation in the form that it was presented to you would not be repeated, I think there is a great deal of dispute, and the appellate briefs highlight that about exactly what that form is: Who was the real sponsor of the mass?

THE COURT: That is not the point.

MS. WHICHER: Whether it was the Women's Club or not.

THE COURT: Just a minute. Wait, wait, wait. That has to do with the issue of the legal effect of the factual situation that was presented to the Court. The question that I posed to Mr. McQueen was about repetition of the factual aspect. Mr. McQueen, is that how you understood my question?

MR. McQUEEN: That's how I understood it, and that's the

representation that I have made to the Court.

THE COURT: Okay.

Now you see, Ms. Whicher, if you say, "Well, suppose. Suppose that what the Village may decide to do is to conduct an Italian Fest and that, in conjunction with that, something is going to be done on property that is not Village property, and there is going to be a scenario." Well, you know, what am I supposed to do? Guess on that? I think it's inappropriate. There have been no formulated plans that I understand.

If and when the determination is made that they are going to be doing something other than what was put before the Court, and that I acted on and the Court of Appeals acted on, then it will be time enough, because that will be a ripe controversy. And I expect that some

other valet -- whatever one you're delivered to by the random assignment system -- will provide the parties with service at that point.

MS. WHICHER: Your Honor, my other point is simply this. That I guess given the representation in the Court of Appeals, I honestly am unclear about what it is the Village is representing will not occur again. And perhaps the appropriate course is for Mr. McQueen and Mr. Levenstam and I to sit down and see if we can't work out some agreed language to submit to the Court that would satisfy the plaintiff that the conduct that he complains of is not going to be repeated.

I proposed this once before in the form of a possible settlement to Mr. McQueen, and maybe that's the appropriate course so that the plaintiff can be assured that this situation is not going to happen again.

THE COURT: You see, your problem is that you use "this situation," and that's the definitional difficulty. Courts deal with concrete factual circumstances. One of the reasons that the existing cases may be viewed by some casual onlookers as roaming all over the lot is that each one of them is the product of a particular set of facts that has gotten presented to the courts at different levels. So that observers may say, and professors may write, and Law Review articles may be written, saying "Here is how the line is to be picked out," the phrase that Justice Frankfurter used when he was talking about how the law developed. And the problem is that this area of the law is not unique, you know. That's what produced McPherson against Buick Motor Company. They were dealing with a different set of facts, and the court said "This is different from what we had

before, and here is how the law is going to be framed. Motor cars are not carriages, you know."

And as a result I don't how to say any differently that what we have here is, as I understand it, an affirmative and firm undertaking that the factual setting that was before this Court in August when the case came up is not one that is going to be repeated.

MR. McQUEEN: I think that is exactly, your Honor, what we presented in writing under the signature of one of the party defendants, the Mayor, on behalf of the Village in the document we filed a month ago.

THE COURT: And I will take that at face value. It has been supported by counsel's representation. Indeed, I did note that in your latest petition to the Court of Appeals there was a sentence to the same effect toward the very end of it

-- which as I say struck me as somewhat inconsistent with what you were asking, but that's for others to decide. And therefore to me the case in terms of any permanent injunctive relief is rendered moot. And accordingly I am going to dismiss the action as moot. Thank you.

MR. McQUEEN: Thank you, Judge.

MS. WHICHER: Thank you, your Honor.

Your Honor, will you be issuing a minute order on this ruling?

THE COURT: The minute order is one sentence long: just the last sentence that I just gave you.

MS. WHICHER: Thank you, your Honor.

MR. McQUEEN: Thank you, Judge.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

C E R T I F I C A T E

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: January 3, 1990